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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1105

ABC AIR FREIGHT COMPANY, INC., ET AL.,
PETITIONERS

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is not yet reported. The prior opinion of the court of appeals (Pet. App. 91-116) is reported at 391 F. 2d 295. The Board's reports and orders (Pet. App. 15-67, 119-201) are not yet reported. The Board's Notice of Proposed Rule Making (Pet. App. 68-90) is published at 34 Fed. Reg. 6853.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 1969. The petition for a writ of certiorari was filed on January 22, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 49 U.S.C. 1486(f).

QUESTIONS PRESENTED

1. Whether the Civil Aeronautics Board complied with the Federal Aviation Act in authorizing three long-haul motor carriers to engage in the air freight forwarding business on a limited and experimental basis.

2. Whether the court of appeals erred in determining that a Notice of Proposed Rule Making setting forth proposed rules governing the entry of other surface carriers into air freight forwarding was not, in view of all the circumstances, ripe for judicial review.

STATUTE INVOLVED

Pertinent provisions of the Federal Aviation Act of 1958 (72 Stat. 737, as amended, 49 U.S.C. 1301 *et seq.*) are set forth in the Appendix to the petition (Pet. App. 202-205).

STATEMENT

Applications filed with the Civil Aeronautics Board by four long-haul motor carriers or their affiliates

sought authority to act as air freight forwarders.[1] An air freight forwarder is an "air carrier" who, within the meaning of Section 101(3) of the Federal Aviation Act, undertakes indirectly to engage in air transportation (49 U.S.C. 1301(3)). Ever since it first authorized air freight forwarding in the *Air Freight Forwarder Case*, 9 C.A.B. 473 (1948), the Board has licensed air freight forwarders by exemption in accord with the proviso of Section 101(3) of the Act.[2]

The Board assigned the matter for hearing to an examiner and instructed him to consider these four applications in the broader context of whether long-haul truckers in general should be allowed to act as air freight forwarders.[3] After a full hearing, the

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[1] The applicants were CF Air Freight, Inc.; D. C. International, Inc.; Navajo Freight Lines, Inc.; and P.I.E. Air Freight Forwarding, Inc. Navajo and D. C. are long-haul motor carriers; CF and P.I.E. are subsidiaries of long-haul motor carriers.

[2] Section 101(3) reads: "'Air carrier' means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: Provided, That the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this chapter to the extent and for such periods as may be in the public interest."

[3] The Board had already authorized long-haul truckers of household goods to act as air freight forwarders for household goods. *Air Freight Forwarder Authority Case*, 40 C.A.B. 673 (1964). Short-haul truckers have been in this business since the very beginning. *Air Freight Forwarder Case*, 9 C.A.B. 473, 508 (1948). And the Board has on occasion permitted entry to applicants controlled by railroads. *Air Freight Forwarder Investigation*, 21 C.A.B. 536, 545-546 (1955).

examiner recommended that all four applicants receive air freight forwarding authority (Pet. App. 132). On review of the examiner's decision, the Board ordered that three of the four applicants receive the authority they had requested.[4] The Board stated that it was satisfied "that the applicants' entry will not lead to the ills which persuaded the Board to deny forwarder authority to some motor carriers in the past" (Pet. App. 122). While admitting that "predictions about the future always carry some measure of uncertainty," the Board concluded that the "applicants' entry into the field is likely to produce important public benefits" and "deserves a trial" (Pet. App. 122, 125).

Petitioners, several of the established air freight forwarders, sought review of the Board's order and decision in the Court of Appeals for the Second Circuit. Upon consideration the court vacated the Board's order and remanded the case (Pet. App. 114). In an opinion by Judge Friendly, the court said: "The most serious deficiency lies in the ambiguity whether the Board has established a policy of entry for all truckers who want to act as air freight forwarders or has merely granted the four [*sic*] applications that were before it, and the inadequacy of

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[4] Approval of the application of the fourth carrier, D. C. International, was deferred pending the filing of a proper application for approval of control by its new parent, National City Lines, Inc. The Board's order also approved the control relationships between the surface carriers and their subsidiaries in accord with Section 408 of the Federal Aviation Act (49 U.S.C. 1378).

its consideration of effect on the existing forwarders if the former is the right interpretation as we strongly suspect" (Pet. App. 97). The court also observed that a new policy of open entry to long-haul truckers was a marked departure from the Board's usual approach of careful and individualized examination of applications by surface carriers, in order to guard against any detrimental conflicts of interest (Pet. App. 102). It stated, however: "We would not wish to be misunderstood as ruling that even the present record might not be sufficient for the Board to initiate a properly controlled experiment in the authorization of truckers as air freight forwarders, with the limitation on numbers and the reporting and other requirements an experiment would be expected to entail" (Pet. App. 113-114).

On remand the Board resolved the ambiguity in its previous action which the court of appeals perceived. After careful analysis of the air freight forwarding market and reconsideration of the individual applicants and their plans (Pet. App. 25-40), it granted authority to those three applicants whom it had previously authorized.[5] The Board made it clear that "it is granting only the applications before it and not passing up on any others" (Pet. App. 17), and described its action as "a controlled experiment, limited to truckers who show a plan to promote air freight conscientiously" (Pet. App. 34). The purpose of the experi-

[5] The Board ruled on the existing record which it found to be "well documented and reasonably current" (Pet. App. 16).

ment, it noted, was to ascertain the existence, if any, of actual conflicts of interest in the engagement of motor carriers in the air freight forwarding business (Pet. App. 35). Since the grant of authority was experimental in nature, the Board ordered the imposition of several limiting conditions, including a five-year maximum term, subject to prior revocation for failure to perform air transportation adequately or conscientiously; a reservation of power to suspend the authority pending revocation hearings; and a requirement that special supplemental quarterly reports as well as a special annual report be filed with the Board (Pet. App. 54-56).[6] The Board indicated a willingness to receive similar applications from other long-haul motor carriers, and stated that the size and commodity rights of a trucker's business would not themselves be a bar to entry (Pet. App. 17). But it warned such prospective applicants: "For long-haul truckers who seek to become air forwarders, the rule will not be free entry, but monitored entry" (Pet. App. 18).

In a Notice of Proposed Rule Making (Pet. App. 70), issued simultaneously, the Board proposed the same stringent requirements for entry which it had imposed on the three motor carriers whom it had authorized to operate as air freight forwarders. It con-

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[6] The quarterly reports are: "Originating Air Station Data Schedule"; "Supplemental Operating Statistics Schedule"; and "Analysis of Traffic by Weight Breaks" (Pet. App. 55, 58-67). The annual report requires listing of air freight forwarding stations, air freight service areas at surface terminals, and personnel involved (Pet. App. 55).

templated granting authority to a long-haul trucker only on a showing of both the intent and the capacity to promote air cargo, and any applicants who received authority would be subject to the same limitations and monitoring already imposed on the three successful applicants.[7]

The established air freight forwarders again petitioned for review, contending principally that the Board had not complied with the court's previous mandate. The court of appeals ruled that its mandate had not been violated (Pet. App. 10) and, in an opinion written again by Judge Friendly, unanimously affirmed the Board's action (Pet. App. 1). The court recognized that the Board had embarked on a controlled experiment (Pet. App. 12), and rejected petitioners' contentions that the Board was too easily satisfied by the successful applicants. It commented as to the policy of monitored entry: "[A] reviewing court must assume the agency means what it says, unless and until experience should indicate the contrary" (Pet. App. 11). In addition, the court held that review of the proposed rules was premature until "the Board grants further authorizations to long-haul truckers under them" (Pet. App. 12).

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[7] The proposed rules were not adopted by the Board until November 12, 1969, subsequent to the decision of the court of appeals; they became effective January 5, 1970 (34 Fed. Reg. 19342-19343).

ARGUMENT

Although petitioners assert that the Board failed to carry out the mandate of the court of appeals, their principal contention is that the Board and the court below did not act consistently with the Federal Aviation Act (49 U.S.C. 1301 *et seq.*) in allowing truckers to engage in air freight forwarding. Congress has, however, vested the Board with broad powers and wide discretion to promote the development of a safe and efficient system of air transportation. See 49 U.S.C. 1302. In the controlled and limited experiment undertaken here the Board is properly and responsibly exercising that duty. The decision below correctly recognized this; there is no conflict among circuits; and no issue warranting plenary consideration by this Court is presented.

1. Petitioners claim that the Board's order allows "the nation's largest motor carriers as a class to become air freight forwarders" (Pet. 10). In so asserting they wholly fail to recognize that the Board did no more than permit three long-haul truckers to enter the air freight forwarding business on an experimental basis for specified period of time. Indeed, the Board emphasized "that it is granting only the applications before it and not passing upon any others" [8] (Pet. App. 17). It thus treated the three applicants, not as a "class", but as individuals, and

[8] Significantly, the Board denied motions to consolidate and intervene filed in the proceeding by seven other long-haul truckers (Pet. App. 48).

granted them authority only after careful examination of their particular plans for operations.

Moreover, the authorization given each of these three truckers was clearly experimental and tentative—the Board limited their authority to five years, set up revocation and suspension conditions, and put upon them special quarterly and annual reporting requirements to "enable the Board to monitor and maintain control over the experiment" (Pet. App. 41). In its opinion accompanying the order the Board did announce that the experiment would not be limited just to the three applicants who received approval, noting that "[i]f other trucking-related enterprises can show that they are equally dedicated to air cargo promotion, they too will be eligible to participate in the experiment under the terms of the proposed regulations issued today" (Pet. App. 36). However, the Board made certain that no trucker would doubt the seriousness of its assertion that "[f]or long-haul truckers who seek to become air forwarders, the rule will not be free entry, but monitored entry" (Pet. App. 18). Its proposed regulations put these prospective entrants to the same requirements for obtaining and holding temporary authority which the Board imposed on the three truckers who received grants of authority (Pet. App. 68). Thus, such applicants must show both the capacity and the desire to promote air cargo (Pet. 84-85),[9] and any grants of authority will be subject to

[9] A *pro forma* showing will be insufficient, for the Board "will not be satisfied with mere recitations; it will scrutinize

the same conditions governing revocation, suspension and reporting (Pet. App. 85, 88-90).

Since the Board explicitly limited its approval of the three applicants to the conditions of a controlled experiment, petitioners' claim (Pet. 13) that the Board has embarked on a wholesale reversal of established policy is not well founded. Moreover, petitioners misconceive the Board's past policy. The Board has not in the past excluded surface carriers from air freight forwarding, but on the contrary has admitted not only truckers but also affiliates of railroads in certain circumstances.[10] Its policy toward surface carriers or their affiliates has been one of discriminating caution. It has been sensitive to potential conflicts of interest, and has accordingly avoided the rigidity of either blanket invitation or blanket prohibition. Rather, since the Board first authorized air freight forwarders in 1948 it has proceeded on an individualized basis and approved or disapproved particular applicants after considering their operating plans in the context of the market they seek to enter. Thus, in the original *Air Freight Forwarder Case*, 9 C.A.B. 473 (1948), the Board's analysis led it to approve grants of authority to ten affiliates of truckers, three of which were motor common carriers (*id.* at 510).

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each application (and any objection) to insure that these criteria are met" (Pet. App. 18).

[10] *Air Freight Forwarder Case*, 9 C.A.B. 473 (1948) (truckers admitted); *Air Freight Forwarder Investigation*, 21 C.A.B. 536 (1955) (railroad affiliates admitted); *Air Freight Forwarder Authority Case*, 40 C.A.B. 673 (1964) (long-haul motor carriers of household goods admitted).

At the same time, however, the Board referred to potential conflicts of interest in holding that grants requested by two affiliates of major railroads were not consistent with the public interest (*ibid.*).[11] Later cases have demonstrated the Board's careful process of inclusion and exclusion of surface carriers in air freight forwarding; in each instance, the decision relating to conflicts of interest was made after thoughtful examination.[12]

The Board's opinion in this case shows that it seriously weighed possible conflicts of interest before authorizing the three applicants to participate in this experiment (Pet. App. 31-35). After examining the plans of the three applicants and the market they sought to enter, the Board concluded: "Each applicant has given persuasive evidence of its intention to promote air cargo. Each has offered a different organizational plan to guard against conflicts with the related surface operation" (Pet. App. 35-36). The Board, moreover, was doubly cautious, for it granted the authority only as part of a controlled experiment to determine whether, and to what ex-

[11] The Board here cited and paraphrased the "public interest" language of Section 408 of the Federal Aviation Act (49 U.S.C. 1378) (see Pet. App. 204).

[12] Thus, in the second *Air Freight Forwarder Investigation*, 21 C.A.B. 536 (1955), the Board permitted the entry of two applicants controlled by large railroads. But examination of Railway Express Agency's particular structure, size and affiliations showed a conflict of interest that caused the Board to deny it a grant of authority to engage in air freight forwarding. *Railway Express Agency, Inc., Air Freight Forwarder Application*, 27 C.A.B. 500 (1958).

tent, motor carriers or their affiliates actually would experience conflicts (Pet. App. 35). The court of appeals correctly concluded that the Board had carefully appraised the plans of the three applicants, and that substantial evidence supported the Board's finding that they genuinely intended to promote air cargo service (Pet. App. 10).

Petitioners' contention that experimentation is impermissible in these circumstances (Pet. 22) is mistaken. Section 102 of the Federal Aviation Act (49 U.S.C. 1302) charges the Board with comprehensive responsibility for the development of an air transportation system which will serve the present and future needs of the nation, preserve the inherent advantages of air transportation, improve relationships with coordinate transportation and promote competition to the extent necessary to assure further development of the nation's air transportation system. Given the dynamic nature of the air transportation industry, power in the Board to experiment and innovate is essential to performance of these responsibilities. Cf. *American Trucking Ass'ns* v. *Atchison T.&S.F.R. Co.*, 387 U.S. 397, 416. And, "in the absence of compelling evidence that such was Congress' intention, [courts have been] unwilling to prohibit administrative action imperative for the achievement of an agency's ultimate purposes." *Permian Basin Area Rate Cases*, 390 U.S. 747, 780. Cf. *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 177.

Congress has not foreclosed this kind of administrative flexibility insofar as entry by surface car-

riers into air freight forwarding is concerned. The second proviso of Section 408(b) of the Federal Aviation Act, on which petitioners rely, is literally inapplicable to indirect air carriers such as air freight forwarders because they do not directly use aircraft in their operations (Pet. App. 7, 104). Assuming that the statute nonetheless radiates a policy applicable to indirect carriers (Pet. App. 104), it does not operate as the total bar seen by petitioners, but simply as an implied direction to the Board to concern itself with possible conflicts of interest between air and surface operations which might affect indirect air carriage. As the court below held, the Board's decision on remand was specifically addressed to this concern; it adopted a policy of closely scrutinized, selected entry under tight controls and specifically tailored restrictions (Pet. App. 10). Against this background the record provides ample support for the authorizations in this case.[13] And, since the Board's opinion sets forth a rational basis for the policy adopted, the court of appeals properly rejected

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[13] Further support for the Board's action may be found in the recent amendment to Section 408(a)(5), contained in P.L. 91-62 (83 Stat. 103). This statute requires approval of any acquisition of an air carrier by any person, but authorizes the Board to exempt acquisitions of non-certificated air carriers from this requirement. Since air freight forwarders are among the "noncertificated" carriers whose acquisition may be exempted (H. Rep. No. 426, 91st Cong., 1st Sess., p. 3), it is clear that no class of persons, not even affiliates of surface carriers, are automatically disqualified from entering the air freight forwarding business by acquisition. *A fortiori*, the Board may authorize *de novo* entry by such affiliates. See Pet. App. 7, n. 2.

as an invasion of the Board's policy-making responsibilities petitioners' contention that the Board was too easily satisfied (Pet. App. 10).[14]

2. Similarly, there is no merit in petitioners' argument (Pet. App. 18-21) that the court of appeals erred in refusing to review the Board's proposed rules. The Board had not at the time of decision below formally adopted the proposed rules (see note 7, *supra*), and any judicial review at that time would have been wholly premature. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41. Moreover, as this Court held in *Toilet Goods Assn.* v. *Gardner*, 387 U.S. 158, a challenge to administrative action is not ripe for judicial review until "the impact of the administrative action could be said to be felt immediately by those subject to it in conducting their day-to-day affairs" (*id.* at 164). Neither the proposal of

[14] Petitioners' suggestion (Pet. 16) of a direct conflict between the Board's decision and the court of appeals over the meaning of Section 408(b) does not provide a basis for review here, for as the court of appeals noted (Pet. App. 10): "the nuance of difference between the Board's views and those intimated in our previous opinion did not affect its decision." The Board's statement on remand that the second proviso of Section 408(b) does not "reflect a Congressional policy against surface carrier participation in the air forwarder business" (Pet. App. 18) was addressed to the petitioners' contention that the statute implies a total bar. The court of appeals never adopted this view, as its first opinion makes clear. Had it done so there would have been no basis for a remand or for the court's statement that it "would not wish to be misunderstood as ruling that even the present record might not be sufficient for the Board to initiate a properly controlled experiment in the authorization of truckers as air freight forwarders" (Pet. App. 113-114).

the rules, nor indeed even their adoption, in view of their nature and effect, results in the kind of impact on petitioners which is required to obtain judicial review. The rules, however, clearly provide for objections to any applicant by interested persons (Pet. App. 79), and any actual grants of authority under those rules will supply the allegedly aggrieved petitioners the ripeness their challenge now lacks.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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